IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 470

RACHEL MAYER, ISAAC H. MAYER AND CARL MEYER, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF LEVY MAYER, DECEASED,

Petitioners,

vs.

MABEL G. REINECKE, AS COLLECTOR OF INTERNAL REVENUE IN AND FOR THE FIRST INTERNAL REVENUE DISTRICT OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ISAAC H. MAYER,
CARL MEYER,
M. B. KENNEDY,
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Chicago, Illinois, October 19, 1942.

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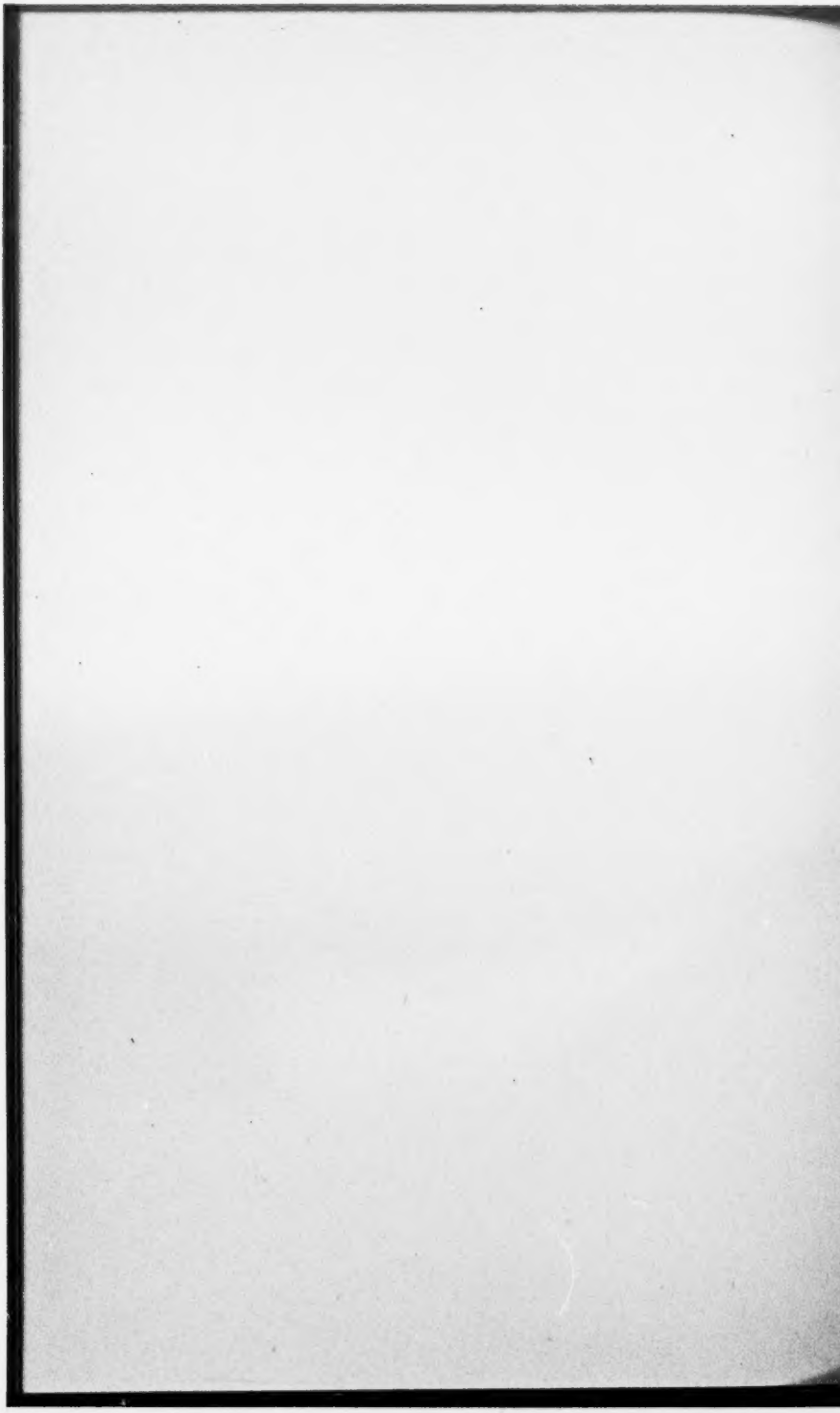

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rachel Mayer, Isaac H. Mayer and Carl Meyer, as Trustees under the Last Will and Testament of Levy Mayer, Deceased, pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on June 23, 1942, which reversed a judgment of the District Court of the United States for the Northern District of Illinois

in favor of petitioners for the sum of $436,156.04 (with 6% interest from August 13, 1923) for a refund of estate taxes (R. 327) and remanded the case to said District Court with directions to enter judgment in respondent's favor (R. 355).

Summary and Short Statement of the Matter Involved.

The decedent, Levy Mayer, a resident of Chicago, Illinois, died in that city on August 14, 1922, leaving a will containing provisions for his widow, Rachel Mayer, a petitioner, and his two daughters, Mrs. Walter A. Hirsch and Mrs. Clarence H. Low. His estate consisted of a large amount of personal property and real estate located in Illinois (R. 320). The real estate was acquired by decedent after his marriage to petitioner, Rachel Mayer, and prior to 1910, which was more than six years before the first estate tax was passed (R. 86, 322).

Under the statutes of Illinois in force at the time of decedent's death (p. 6, *infra*), his widow had a choice of either accepting the testamentary provisions for her benefit, or taking in lieu thereof "one-third of the personal estate after the payment of all debts", and also her "dower in the lands" of decedent. The widow took under the will (R. 321).

On August 4, 1927 the then Trustees duly filed a claim for refund (R. 322) based upon the contentions (a) that the one-third statutory interest of the widow in the personal property of decedent should not have been included in determining the gross value of decedent's taxable estate, because it was not subject to the payment of the expenses of administration, and, therefore, under the provisions of Section 402(a) of the 1921 Revenue Act, 42 Stat. 278, should not have been included; and that it was neither dower nor an interest existing by virtue of a statute creating an estate in lieu of dower, and therefore, under the provisions of Section 402(b) of said Revenue Act of 1921 should not have been included; and (b) that the widow's statutory life in-

terest in one-third of decedent's lands should not have been included in determining the gross value of decedent's taxable estate, because under the Illinois law a widow's dower interest, whether inchoate or consummate was the widow's separate estate acquired by her upon her marriage, or the subsequent purchase of the lands after her marriage, solely by virtue of statute and not by transfer or succession from her husband; and that Section 402(b) of such Revenue Act of 1921 is unconstitutional if construed to include the widow's dower, because, if so construed, it is retroactive and is also a direct tax.

Said claim for refund was rejected by the Commissioner of Internal Revenue in its entirety (R. 116) and this action was then commenced in the Federal District Court for the Northern District of Illinois (R. 2) to recover the amount for which such claim was filed. The District Court held (*Mayer* v. *Reinecke,* 28 F. Supp. 334), that (1) the taxable status of the decedent's property must be determined as of the date of his death; (2) the widow's one-third statutory interest in the decedent's personal property was not subject to the payment of the expenses of administration and for that reason did not come within Section 402(a) of the 1921 Revenue Act and should have been excluded in determining the taxable value of the decedent's property; (3) that under the decision of this Court in *Crooks* v. *Harrelson,* 282 U. S. 55, (A) such statutory interest of the widow must be subject to the payment both of the debts of the decedent and the expenses of administration, (B) debts of the decedent are a separate and distinct thing from expenses of administration, and (C) the fact that such interest of the widow was subject to the payment of the debts of the decedent did not justify its inclusion in determining the taxable value of the decedent's property since such interest of the widow was not also subject to the payment of expenses of administration; (4) the widow's statutory interest in the lands belonging to the husband was unquestionably the separate,

exclusive property of the widow for many years before decedent's death and was not transmitted to her by the death of the decedent; and to hold that Section 402(b) of the Revenue Act of 1921 required inclusion of the value of such interest of the widow in determining the taxable value of decedent's estate would be equivalent to holding that Congress had provided that property belonging to a stranger should be included in determining such value; that such construction would be destructive of the power of Congress to impose an estate tax, and might be equivalent to the imposition of a direct tax by the Federal Government on the property of such widow and also be retroactive.

The United States Circuit Court of Appeals for the Seventh Circuit reversed the decision of the District Court and held that (a), the word, "debts," "includes the expenses of administration as well as the obligations of the decedent", and that therefor the statutory interest of the widow in the personal property of the decedent should be included in determining the taxable value of decedent's estate (the case of *Crooks* v. *Harrelson*, 282 U. S. 55, decided by this Court was not referred to by the Circuit Court of Appeals); (b), the value of the statutory interest of the widow in the real estate of the decedent should be included in determining the value of the taxable estate of the decedent on the theory that the Estate Tax fixes upon the interest of the decedent which ceased by reason of the death.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in *Mayer* v. *Reinecke*, 7 Cir. 130 F. 2d 350 (Adv. Sh.) and will also be found in the transcript of record at p. 349. The opinion of the District Court on demurrer to the declaration is reported in 28 F. Supp. 334. The opinion was reaffirmed by that court on final hearing (R. 300).

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered June 23, 1942 (R. 355). A petition for rehearing was filed by the petitioners herein on July 7, 1942 (R. 356), which was within the 15 days time prescribed by Rule 22 of the Rules of said Circuit Court of Appeals (11 U. S. Sup. Ct. Rep. Dig. Suppl. No. 3, p. 78) and was denied on July 24, 1942 (R. 356). The jurisdiction of this Court is invoked under Section 240(a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, 940; 28 U. S. C. A., § 347(a), § 350.

Questions Presented.

1. Should the one-third interest in the personal property of decedent, after the payment of "debts," which the widow had under the statutes of Illinois at the time of decedent's death, have been included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921?

2. Should the statutory life interest, or dower in the lands of decedent which the widow had under the Illinois statutes at the time of the decedent's death, have been included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921?

Statutes Involved.

Sections 401 and 402 (a) and (b) of the federal Revenue Act of 1921, effective November 23, 1921, (42 Stat. 227, 277, 278, c. 136) the provisions of which were as follows:

> "SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403)

is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: * * *"

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;"

Section 10, Chapter 41, Illinois Revised Statutes, (Cahill 1921), the provisions of which were as follows:

"SEC. 10. Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts."

Reasons for Allowance of Writ.

1. The United States Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way probably in conflict with the applicable decision of this Court. Its decision in this matter, dated June 23, 1942, places a construction on Section 402 of the federal Revenue Act of 1921, (which was in force at the time of decedent's death in 1922) which is actually in direct con-

flict with the construction placed on said section by this Court in the case of *Crooks* v. *Harrelson*, 282 U. S. 55.

The Circuit Court of Appeals for the Seventh Circuit held that the one-third of the personal property after payment of "debts," which the widow was entitled to take under Section 10, Chapter 41, Illinois Revised Statutes (Cahill 1921), should be included in the gross estate of the decedent on the ground that the word "debts" in the Illinois statute "includes expenses of administration as well as the obligations of the decedent."

Said Section 10 provides,

> "She [the widow] shall be entitled * * * to one-third of the personal estate after the payment of all debts."

In construing Section 402 (a) of the federal Revenue Act of 1918 (which was identical with Section 402 (a) here involved) this court, in *Crooks* v. *Harrelson*, 282 U. S. 55, 58, (a case which, although drawn to its attention, the Court of Appeals wholly ignored), held (p. 58):

> "The value of the interest of the decedent is not to be included unless it 'is subject to the payment of the charges against his estate *and* the expenses of its administration'—not one or the other, but both. We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word 'and' was used otherwise than in its ordinary sense; and to construe the clause as though it said, 'to the payment of charges and expenses, *or either of them*,' as petitioner seems to contend, would be to add a material element to the requirement, and thereby to create, not to expound, a provision of law. *Nor will it do to say that the words, 'charges against his estate,' include expenses of administration, for plainly they are different and distinct things, generally so classified in the settlement of estates of decedents,* AND SO REGARDED BY CONGRESS, *as evidenced by the discriminating terms of the statute.*"[1]

[1] (Italics and capitals in last sentence are ours.)

This Court having decided that Congress, in enacting the statute in question, regarded debts and expenses of administration as "plainly * * * different and distinct things" and that debts do not include expenses of administration, and that property subject to the payment of "debts" is not taxable under the taxing Act under consideration,—the decision of the Circuit Court of Appeals that "debts" include "expenses of administration" and that property subject to "debts" is taxable under said Act, is plainly in direct conflict with the decision of this Court.

The Circuit Court of Appeals states in its opinion that its opinion is based on "dicta and tacit holdings" of Illinois courts.

We respectfully submit that the Circuit Court of Appeals misapprehended the decisions which it cites in support of its opinion and ignored other decisions of Illinois courts. The cases cited by the Court are distinguished and additional decisions of the Illinois courts are cited in the brief appended hereto (pp. 16-20).

2. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions

The construction placed by the Circuit Court of Appeals on Section 10, Chapter 41 of the Illinois Revised Statutes (Cahill 1921), is in conflict with the applicable decisions of the Illinois Supreme Court.

The Supreme Court of Illinois has repeatedly held that expenses of administration are different from and are not included within the term "debts", and that expenses of administration are not debts of the deceased but are obligations created by his representative and are merely claims against the representative personally and not against the estate and cannot be filed as claims against the estate.

Fitzgerald v. *Glancy* (1869), 49 Ill. 465, 468:

> "This is the first case, within our knowledge, where debts have been created by an administrator after the

death of his intestate, and allowed by a court as claims against his estate, and an order granted to sell his lands to pay them. They were not such claims, and cannot, by any legal alchemy, be made such, * * *"

This rule has been consistently followed by the Illinois courts:

Walker v. *Diehl* (1875), 79 Ill. 473;
Berry v. *Berry* (1941), 309 Ill. App. 7;
Edwards v. *Lane* (1928), 331 Ill. 442, 451:

"Before an executor or administrator can be allowed credit for expenses of administration it must appear the expenditures were reasonably necessary for the benefit of the estate. An executor or administrator has no power, as such, to create a debt against the estate."

In *Chicago Title and Trust Co.* v. *Fine Arts Building*, (1919) 288 Ill. 142, 150, the court, while speaking of a liability arising out of the contract of the deceased and a liability arising out of the action of the representative, said:

(150) "The former is a claim against the estate of the deceased, while the latter is a claim against the representative. * * * *Such claims are inconsistent*".

In re Estate of Thurber (1924), 311 Ill. 211, 215:

"* * * debts created after the death of the testator cannot be filed as claims against his estate".

People v. *Danforth* (1938), 293 Ill. App. 280, 284:

"The approved practice is to allow the claim for an attorney's fee in representing an administrator against the administrator, personally, and not against the estate, and the proper procedure is for the administrator to pay the fee and take credit therefor in his final account."

The foregoing, controlling decisions were entirely ignored by the Circuit Court of Appeals although drawn to its attention, and, as stated by the Court itself, its opinion on

this point is based *entirely* on "dicta and tacit holdings" of Illinois courts (130 F. 2d at p. 354).

The cases cited by the Court of Appeals are distinguished and additional decisions of the Illinois courts are cited by us in the supporting brief appended hereto (pp. 16-20, *infra*).

The Court of Appeals has decided another important local question in conflict with Illinois decisions, as shown in paragraph 4, *infra*.

3. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision which is also in conflict with the decision of another Circuit Court of Appeals on the same matter.

The decision of the Circuit Court of Appeals for the Seventh Circuit is also in conflict with the decision of the Sixth Circuit Court of Appeals in the case of *Helburn* v. *Ballard*, 6 Cir., 85 F. 2d 613 (affirming 9 F. Supp. 812), in which said Court of Appeals held that the dower interest of the widow in the lands of the decedent should not be included in determining the gross value of the decedent's taxable estate under the provisions of the federal Revenue Act of 1924, which provisions, as to the matter here under consideration, were the same as those of the federal Revenue Act of 1921.

From an examination of the opinions in *Helburn* v. *Ballard* in both the District Court and the Circuit Court of Appeals, it will be seen that the Sixth Circuit Court of Appeals grounded its decision upon the fact that "the position of devisee and doweress are inconsistent", and that "there was no transfer upon which the tax could be based".

4. The Circuit Court of Appeals for the Seventh Circuit has decided another important question of local law in a way probably in conflict with applicable decisions of the Illinois Supreme Court.

It is well settled by the decisions of the Supreme Court of Illinois that a widow's dower interest, whether inchoate,

or consummate, is her exclusive, separate property, that her husband has no interest in or control over it and that said interest cannot be affected in any way without her consent.

Sutherland v. *Sutherland,* 69 Ill. 481, 486.
Blankenship v. *Hall,* 233 Ill. 116, 129.

It is equally well settled by the decisions of the Supreme Court of Illinois that the widow acquires her interest in her husband's lands in Illinois solely by operation of law through her marriage and not from, or through but independently of her husband, and that this interest is a life estate contingent only upon her surviving her husband, and that his death "casts upon her no new estate or interest."

In *Sisk* v. *Smith,* 6 Ill. 503 (a case ignored by the Court of Appeals although drawn to its attention) the court said:

(506) "But although dower is a title inchoate, and not consummate, until the death of the husband, yet it is an interest, which attaches on the land, as soon as there is the concurrence of marriage and seizin."

With respect to the effect of the husband's death the court added:

(507) *"That event, therefore, casts upon her no new estate or interest, but simply consummates a pre-existing imperfect one.* • • •

(508) "The contract of marriage is as operative to confer upon the wife a separate life estate in the lands of her husband, as would be a contract whereby the husband himself had conveyed to any third person, a life estate, in express terms, in the same lands, and as the tenant for life in such case would hold such estate as an incumbrance upon the fee simple estate of the grantor, beyond his reach or control, so does the wife hold her freehold estate beyond the reach or control of her husband, and discharged from all judgments, leases, mortgages, or other incumbrances, made by her husband after the marriage, because her title being consummated by his death, has relation to the time of

> the marriage, and to the seizin which her husband then had, both of which are prior to said incumbrances." (Italics ours.)

To the same effect are *Emmert* v. *Hill*, 226 Ill. App. 1 and *Schoellkopf* v. *DeVry*, 366 Ill. 39, both of which cases were also ignored by the Court of Appeals although drawn to its attention.

In *Schoellkopf* v. *DeVry*, 366 Ill. 39, 44-5, the court said:

> "The wife's life estate, denominated dower, arose solely by operation of law * * *. The wife's right to dower accrues solely because of the marriage relation and is in addition to the share of her husband's estate to which she is entitled under the Statute of Descent."

The cases cited by the Circuit Court of Appeals to support its opinion that the widow's statutory interest in decedent's lands was properly included in valuing decedent's gross estate, are distinguished, and additional decisions of the Illinois courts are cited by us in the supporting brief appended hereto (pp. 21-28, *infra*).

5. The Circuit Court of Appeals for the Seventh Circuit has so construed Section 402(b) of the federal Revenue Act of 1921 as to render said section unconstitutional.

All of decedent's real estate was acquired by him prior to 1910 and while married to the petitioner, Rachel Mayer (R. 86). His widow therefore acquired her dower right many years before the enactment of the first federal estate tax statute which was in 1916 (R. 291). Dower was first included in the estate Tax Act of 1919. In 1924, which was two years after decedent's death, that provision was made retroactive. We respectfully submit that to so interpret Section 402(b) of the federal Revenue Act of 1921 as to require the inclusion of the value of such dower in the taxable estate of the decedent is to render that section unconstitutional and void as retroactive, a direct tax and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, under the princi-

ples announced by this Court in the cases of *Nichols* v. *Coolidge*, 274 U. S. 531; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Coolidge* v. *Long*, 282 U. S. 582; *White* v. *Poor*, 296 U. S. 98, and *Helvering* v. *Helmholz*, 296 U. S. 93.

Petitioners respectfully submit and pray that because of the foregoing special and important reasons the writ of certiorari should issue.

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Attorneys for Petitioners.

Chicago, Illinois, October 19, 1942.